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No. 15-457

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Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. IT IS WELL-SETTLED THAT FEDERAL COURTS RETAIN JURISDICTION OVER A CLASS ACTION EVEN IF THE NAMED PLAINTIFF'S CLAIMS ARE MOOT 3

A. Federal courts have jurisdiction over a class action even if the named plaintiff's claim becomes moot before the class is certified 3

B. *Roper* and *Geraghty* comport with Article III. 5

TABLE OF CONTENTS

(continued)

Page

1. Once the court grants certification, the existence of a class with live claims "relates back" to the filing of the complaint, meaning that a case or controversy existed throughout the litigation. 6

2. The rights of the absent class members modify the mootness analysis. 8

3. The purpose of the 'personal stake' requirement is satisfied in a class action even if the named plaintiff's claim is moot..... 9

C. This Court's recent opinions are consistent with *Roper* and *Geraghty*.,.....10

TABLE OF CONTENTS

(continued)

Page

II. THE MOOTNESS PRINCIPLES IDENTIFIED IN *ROPER* AND *GERAGHTY* ARE CRITICAL TO THE INTEGRITY AND EFFICACY OF THE CLASS ACTION DEVICE..... 12

A. Mooting class actions when absent class members have live claims would disrupt the Rule 23 process. 12

B. Mooting class actions would have particularly troubling implications for small-value claims. 14

III. *ROPER* AND *GERAGHTY* SUPPORT AFFIRMANCE IN THIS CASE..... 15

CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

Cases

Already, LLC v. Nike, Inc.,
133 S. Ct. 721 (2013) 5

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 2, 12, 14

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 5, 10, 14

Carnegie v. Household Int'l, Inc.,
376 F.3d 656 (7th Cir. 2004) 15

Cnty. of Riverside v. McLaughlin,
500 U.S. 44 (1991) 7

Daubert v. Merrell Dow Pharm., Inc.,
509 U.S. 579 (1993) 13

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) ..... passim

Eisen v. Carlise & Jacquelin,
417 U.S. 156 (1974) 14

Flast v. Cohen,
392 U.S. 83 (1986) 9

Franks v. Bowman Transp. Co., Inc.,
424 U.S. 747 (1976) 7

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 5

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 5, 10

TABLE OF AUTHORITIES
(continued)

Page

Gulf Oil Co. v. Bernard,
452 U.S. 89 (1981) 13

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 10, 11

Philips Petrol. Co. v. Shutts,
472 U.S. 797 (1985) 15

Sosna v. Iowa,
419 U.S. 393 (1975) 6, 7

Tyson Foods v. Bouaphakeo,
136 S. Ct. 1036 (2016) 13

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 7

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) ..... passim

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 12, 13

Rules

Advisory Notes to Rule 23, 2003 Amendments 13

Fed. R. Civ. P. Rule 23(d)(1)(E) 13

Fed. R. Civ. P. Rule 23(d)(C) 13

Fed. R. Civ. P. Rule 23(g)(3) 13

Sup. Ct. R. 37.3(a) 1

TABLE OF AUTHORITIES
(continued)

Page

Treatises

William B. Rubenstein, Newberg on Class Actions
§ 3:71 (5th ed. 2015)..... 6

STATEMENT OF INTEREST[1]

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions. In its experience, the class action device is often the only meaningful way that individuals can vindicate important legal rights.

Public Justice submits this brief to underscore the importance of the principles embodied in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). These cases hold that a proposed class representative has a concrete, personal stake in actually representing the class, even if her individual claims become moot. Disrupting this principle—rooted in nearly 40-years of precedent—would contravene Article III and undermine the integrity and efficacy of the class action device.

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[1] No counsel for a party authored any part of this brief. Only Amicus and its attorneys paid for the filing and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court has recognized repeatedly that a named plaintiff has a personal, concrete stake in being a class representative, even if her individual claims ultimately become moot. That principle was set out in two landmark decisions more than thirty years ago, and it traces back to precedent even older than that. It flows from—and is compelled by—Article III.

This Court has recognized that diverse and interrelated interests implicate justiciability in the class action context, in part because absent class members have a stake in the outcome of the litigation. This means that the named plaintiff (no less than the absent class members) has a personal stake in class certification even if her individual claims have somehow become moot.

The principle that a proposed class representative has a personal stake in the outcome of class certification, even if her individual claim becomes moot, is critical to the integrity and efficiency of the class action device. Rule 23 sets out a carefully-ordered process that would be disrupted if the class action were mooted whenever a named plaintiff's claim becomes moot. This concern is amplified in cases involving small-value individual claims, where the alternative to a class claim is no claim at all. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the

incentive for any individual to bring a solo action prosecuting his or her rights." (citation omitted)).

Amicus respectfully submits that it is appropriate under *Roper* and *Geraghty* to affirm the United States Court of Appeals for the Ninth Circuit. But Amicus recognizes that these cases do not compel affirmance because neither involved a named plaintiff who voluntarily abandoned his substantive claims. Thus, if the Court reverses the Ninth Circuit, it can and should do so while reaffirming *Roper* and *Geraghty*.

ARGUMENT

I. IT IS WELL-SETTLED THAT FEDERAL COURTS RETAIN JURISDICTION OVER A CLASS ACTION EVEN IF THE NAMED PLAINTIFF'S CLAIMS ARE MOOT.

Under this Court's well-settled precedent, even if a named plaintiff's individual claim becomes moot, the class action as a whole does not. That is because a class representative has a personal stake in representing the class even if the class has not yet been certified. No other rule would comport with Article III.

A. Federal courts have jurisdiction over a class action even if the named plaintiff's claim becomes moot before the class is certified.

In *Deposit Guaranty National Bank v. Roper*, the Court held that an unaccepted offer of judgment to the named plaintiffs did not moot a class action.

445 U.S. at 329-39. This was true even though the district court denied class certification and entered judgment in favor of the named plaintiffs over their objections. *Id.* at 329-30.

The Court recognized that a proposed class representative retains "an economic interest in class certification." *Id.* at 333. Then-Justice Rehnquist concurred to explain that "an *unaccepted* offer of tender in settlement of the individual putative representative's claim" could not moot a class action because "the defendant ha[d] not offered all that ha[d] been requested in the complaint (i.e., relief for the class)[.]" *Id.* at 341. Justice Rehnquist observed that this rule was not only compelled by Article III, it was also sound policy because "any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable." *Id.*

Similarly, in *U.S. Parole Commission v. Geraghty*, the Court held that a proposed named plaintiff has a "personal stake . . . in the right to represent a class" even when his individual claim has expired, such that he can appeal the denial of class certification without undermining "Art[icle] III values." 445 U.S. at 402-04. In such cases, the proposed class representative can "continue[] vigorously to advocate his right to have a class certified" regardless of the status of his personal claim. *Id.* at 404.

Finally, just this Term, this Court, explaining why an unaccepted Rule 68 offer of judgment does not moot an individual claim, observed that "a

would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). A fair opportunity means the chance to seek class certification even if the named plaintiff's claims become moot.

B. *Roper* and *Geraghty* comport with Article III.

It is well established that Article III requires a plaintiff to have a "personal stake in the outcome of the lawsuit" for a federal court to exercise jurisdiction. *Id.* at 669 (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013)). If a plaintiff is deprived of that personal stake at any point in the litigation, the case must be dismissed as moot. *Id.*

In an individual lawsuit, the mootness inquiry is straightforward, typically concerned with the redressability of the individual claim, and sometimes with the public interest in the adjudication of certain controversies. *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190-91 (2000). Mootness operates differently in representative litigation because a proposed class representative has a concrete, personal interest in actually being a class representative. *See Geraghty*, 445 U.S. at 400 (observing that the Court's precedents "demonstrate the flexible character of the Art. III mootness doctrine" in the class action context).

1. Once the court grants certification, the existence of a class with live claims "relates back" to the filing of the complaint, meaning that a case or controversy existed throughout the litigation.

The central principle animating *Roper* and *Geraghty* is that a certified class has a legal status independent of the class representative. This is the reason that a certified class does not suddenly evaporate if the named plaintiff's claims become moot.[2] *Roper* and *Geraghty* recognized that the same rule must apply where the named plaintiff's claims become moot before the class has been certified. To hold otherwise would be arbitrary, unfair, and counter to the purposes of Article III because it would prevent the court from ever reaching the live class claims.

Roper and *Geraghty* derived from this Court's earlier decision in *Sosna v. Iowa*, which held that a class action was not moot where the class representative's claim became moot after class certification. 419 U.S. 393, 399 (1975). The Court explained that, upon certification, "the class of unnamed persons . . . acquired a legal status separate from the interest" of the named plaintiff.

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[2] Nor would class litigation automatically dissolve if a named plaintiff died without a successor in interest. *See* William B. Rubenstein, Newberg on Class Actions § 3:71 (5th ed. 2015) (noting that "[w]hen the estate's representative is deemed inadequate, the court will invite intervention of other class members to bolster the adequacy of representation").

Id; *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-395 (1977) (holding that a putative class member may intervene, after the named plaintiff's claims have been satisfied, to appeal the denial of class certification).

Because the legal interest satisfies Article III, *Sosna* explained, class certification can be said to "relate back" to the filing of the class complaint if mootness arises *before* certification. 419 U.S. at 402 n.11. Although *Sosna* suggested that the "relation back" doctrine might only apply where the case presents issues capable of repetition but evading review, the Court later made it clear that the doctrine was not so limited. *See Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 754-55 & n.7 (1976) ("[N]othing in . . . . *Sosna* . . . holds or even intimates" a requirement that "there remains an issue 'capable of repetition, yet evading review.'").

The "relation back" doctrine applies where a claim is "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (quoting *Geraghty*, 445 U.S. at 399).

That is the case where the individual named plaintiff's claim is moot. If the representative is barred from pursuing class certification, then the question of whether the class should be certified—a question that, if answered in the affirmative, creates a live interest satisfying Article III—will never be answered. Article III should not be applied to allow

concrete, live issues to evade review. *Cf. Roper*, 445 U.S. at 341 (Rehnquist, J., concurring) (explaining that permitting offers of judgment to the named plaintiffs to moot the class action "would give the defendant the practical power to make the denial of class certification questions unreviewable").

2. The rights of the absent class members modify the mootness analysis.

Roper identified "the interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 331. First are interests of the named plaintiffs: "their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims." *Id.* Second, "distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interest of the putative class." *Id.* Third are "the rights of putative class members as potential intervenors." And fourth are "the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it." *Id.*

The *Roper* Court recognized the relevance of these "interrelated" and "diverse" interests. *Id.* Ultimately, however, the Court resolved the case by considering only the private interest of the named plaintiffs, finding that the plaintiffs "retained an economic interest in class certification." *Id.* at 332-

33. Specifically, the Court found a sufficient economic interest in the named plaintiffs' "desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails." *Id.* at 336. This economic interest, the Court held, confers Article III standing on the named plaintiffs to represent the absent class members even when the named plaintiffs' individual claims had been dismissed by the court.

3. The purpose of the 'personal stake' requirement is satisfied in a class action even if the named plaintiff's claim is moot.

In the class action context, mootness principles must be applied pragmatically, with an eye to the underlying purposes of Article III. *See Geraghty*, 445 U.S. at 402 ("Determining Art. III's 'uncertain and shifting contours' . . . with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case-or-controversy requirement.") (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1986)). In *Geraghty*, the Court explained that "the purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual settling and self-interested parties vigorously advocating opposing positions." *Id.* at 403.

Both of those conditions can be satisfied in a class action even if the named plaintiff's claim is moot. That is because regardless of the merits of any class members' claim, "[t]he question whether class

certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403-04. Therefore, so long as the named plaintiff continues "vigorously to advocate his right to have a class certified," she "retains a 'personal stake' in obtaining class certification sufficient to ensure that Art. III values are not undermined." *Id.*

C. This Court's recent opinions are consistent with *Roper* and *Geraghty*.

Roper and *Geraghty* have been well-settled law for decades. Some argue, however, that more recent decisions undermine the Article III principles established in those cases. That is incorrect.

This Court's recent decision in *Genesis Healthcare Corp. v. Symczyk* does not alter the Article III analysis. 133 S. Ct. 1523. In *Genesis*, the issue of whether a resolved individual claim deprives the plaintiff of standing to challenge the denial of class certification was not before the Court. *Id.* at 1529-30. This Court held simply that *if* a plaintiff has no personal interest in the litigation, that case is moot even if the plaintiff seeks to bring a collective action. *Id.* at 1532. The Court also distinguished *Roper* and *Geraghty* by noting that "there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)." *Id.* at 1527 n.1.

Nor does *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), call *Roper* into question. *Contra Campbell-Ewald*, 136 S. Ct. at 679 n.1 (Roberts, C.J., dissenting). In *Lewis*, the Court stated that an "interest in attorney's fees is, of course, insufficient

to create an Article III case or controversy where none exists on the merits of the underlying claim[.]" 494 at 480. *Lewis* involved a claim brought by one bank, the merits of which were rendered moot by subsequent legislation. *Id.* at 478. *Lewis* therefore stands only for the proposition that where the merits of an action are moot—where "the only concrete interest in the controversy has terminated," *id.* at 480—a claim for attorney's fees alone will not maintain the court's jurisdiction.

By contrast, in cases like *Roper* and *Geraghty*, although the named plaintiff's claims were moot, the claims of the absent class members were not, and the "controversy" therefore remained live. *Cf. Roper*, 445 U.S. at 341 (Rehnquist, J., concurring) (explaining that the case was not moot because "the defendant has not offered . . . relief for the class").

Even if *Lewis* did undermine the case-specific rationale of *Roper* (that named plaintiffs with mooted claims retain an interest in sharing fees and costs with the class), that rationale was not the main thrust of the Court's holding. Instead, as explained above, the Court identified several "diverse" and "interrelated" interests relevant to justiciability questions in the class-action context, but found it unnecessary to look beyond the narrow private interests of the named plaintiffs to resolve the case. 445 U.S. at 331-32.

Those interests, in particular the need to protect absent class members, undergird the core holdings of *Roper* and *Geraghty*: that a named plaintiff has a personal, concrete stake in actually

being a class representative, whether or not her individual claims ultimately become moot.

II. THE MOOTNESS PRINCIPLES IDENTIFIED IN *ROPER* AND *GERAGHTY* ARE CRITICAL TO THE INTEGRITY AND EFFICACY OF THE CLASS ACTION DEVICE.

Roper and *Geraghty*'s approach to mootness in the class action context is also crucial to preserving the efficient use of class actions. If federal courts were stripped of jurisdiction over class actions whenever the named plaintiffs' claims become moot, the Rule 23 process would be disrupted and its objectives frustrated. That outcome would be particularly harmful to low-value claims, the kinds of cases where class actions are most important *See Amchem*, 521 U.S. at 617.

A. Mooting class actions when absent class members have live claims would disrupt the Rule 23 process.

Rule 23 creates a carefully regulated process for district courts to supervise class actions and protect the interests of absent class members. The central event in that process is the class certification motion.

Making a motion for class certification is not simple because "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This Court has held that "[a] party seeking class certification must affirmatively demonstrate his compliance with the

Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

Meeting those requirements often requires substantial evidence, evidence typically in the control of the defendant. Motions practice pre-certification is also common. For example, class certification often involves expert testimony, *see, e.g.*, *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), prompting motions to exclude under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

For that reason, class certification takes time. Rule 23 establishes a court-supervised process that enables the named plaintiffs to marshal the evidence required to meet their burden. The Rule was amended in 2003 to change the time for the certification decisions from "as soon as practicable" to "an early practicable time." Advisory Notes to Rule 23, 2003 Amendments. And district courts have the authority, even before a class is certified, to appoint interim class counsel, Rule 23(g)(3), "impose conditions on the representative parties," Rule 23(d)(C), regulate communications with absent class members, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-102 (1981), and deal with other "procedural matters," Fed. R. Civ. P. 23(d)(1)(E).

During the period before a class is certified, the named plaintiffs' claims may become moot, whether through actions of the defendant or simply though the passage of time. Permitting that to moot the class action would disrupt the orderly Rule 23 process, prevent the district court from determining

class certification, and frustrate the objectives of Rule 23. *See Campbell-Ewald*, 136 S. Ct. at 672 ("[A] would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."); *Roper*, 445 U.S. at 339 ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions[.]"); *Geraghty*, 445 U.S. at 399 (recognizing as a problem that "the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.").

B. Mooting class actions would have particularly troubling implications for small-value claims.

As this Court has repeatedly recognized, the class procedure often is most critical in negative-value cases where each individual's claim is too small to justify the expense of an individual action. *See, e.g.*, *Amchem*, 521 U.S. at 617; *Roper*, 445 U.S. at 339 (explaining that "aggrieved persons may be without any effective redress unless they may employ the class-action device"). *Eisen v. Carlise & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *see also Carnegie v. Household*

Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

The mooting of class actions when absent class members retain justiciable claims threatens to deprive low-value plaintiffs of their "realistic day in court." *Philips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985). As demonstrated in cases like *Roper* and *Campbell-Ewald*, if permitted, defendants will attempt to "pick off" the named plaintiffs by mooting their small individual claims. If successful, defendants will prevent courts from ever reaching the class certification decision, and from ever deciding the merits of the absent class members' claims. *See Roper*, 445 U.S. at 339 ("To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.").

III. *ROPER* AND *GERAGHTY* SUPPORT AFFIRMANCE IN THIS CASE.

The above analysis warrants affirmance here. The same concerns animating the holdings in *Roper* and *Geraghty* are present here: the risks that class certification will go unreviewed; that the Rule 23 process will be disrupted; and that absent class members' interests' will be unadjudicated and therefore unvindicated. This Court can, and should, apply the principles articulated in *Roper* and *Geraghty* to affirm the judgment below.

It is true, of course, that in *Roper* and *Geraghty*, the named plaintiffs' claims were resolved against their will, either through defendants' actions, or through the passage of time. *See Roper*, 445 U.S. at 332 (emphasizing that "[t]he factual context in which this question arises is important," and stating that "judgment was entered in [plaintiffs'] favor without their consent and the case was dismissed over their continued objections"). Here, the plaintiffs voluntarily dismissed their claims in order to appeal the order striking their class claims from the complaint.

Although Amicus believes that *Roper* or *Geraghty* apply equally here, it recognizes that this Court may disagree. *See Geraghty*, 445 U.S. at 404 n.10 ("We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art[icle] III, appeal from the adverse ruling on class certification."). For this reason, should the Court reverse, it can and should do so without calling the rule articulated in *Roper* and *Geraghty* into question. *Cf.* Petitioner's Br. at 39-41 (arguing that this case does not implicate *Roper* and *Geraghty*, which "are designed to . . . prevent defendants or the mere passage of time from thwarting potentially meritorious class actions").

CONCLUSION

Amicus respectfully submits that whether it affirms or reverses, the Court should be careful not to disturb the longstanding and important principle that a named plaintiff has a personal, concrete stake

in actually being a class representative, whether or not her individual claims ultimately become moot.

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Respectfully submitted,

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